



U.S. Department of Justice

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Southern District of New York*

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February 18, 2020

BY ECF

The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *United States v. German Marmolejos*, S2 18 Cr. 303 (JMF)

Dear Judge Furman:

The Government writes to respectfully request that the Court set a briefing schedule regarding the defendant's proposed Rule 12.2(b) defense, which the Court should preclude in full without a hearing. While the proposed defense fails on multiple threshold grounds and should be precluded, in an abundance of caution, the Government also requests that the Court enter the attached proposed order authorizing an expert evaluation of the defendant.

As the Court is aware, in November 2019, the Court adjourned trial in this matter to April 20, 2020, allowing the defendant time to prepare his purported Rule 12.2(b) defense, which required an evaluation from a newly retained expert. On January 29, 2020, defense counsel filed a one-sentence notice paraphrasing Rule 12.2(b)(1). On February 3, 2020, the Court held a conference at which Your Honor set a deadline of February 14, 2020, for the defense to disclose "a summary of any expert that you intend to call at trial and provide a summary of that expert's qualifications, opinions, and the bases and reasons for those opinions." (Feb. 3, 2020 Tr. 9.)

On February 14, 2020, defense counsel provided to the Government a "summary of expert testimony that the defense intends to offer at trial" (the "February 14 Notice"). *See* Ex. A.¹ The defendant disclosed that it intends to call Dr. Edward Fernandez to testify consistently with his two reports dated May 7, 2018 and October 1, 2018 as well as his testimony from April 3, 2019 and April 11, 2019. (*Id.* at 1.) These reports were issued in 2018 in advance of the competency hearing in this matter and his testimony was provided at the April 2019 competency hearing. The February 14 Notice lists a number of purported clinical "fact witnesses" who would testify about their prior evaluations of the defendant. The February 14 Notice discloses that Dr. Fernandez will opine that Mr. Marmolejos suffers from certain mental disorders (*id.*), but does not explain how any of these experts (or purported fact witnesses) would opine that the defendant suffers a mental disease or defect that "bear[s] on . . . the issue of guilt," Fed. R. Crim. P. 12.2(b)(1).

¹ Given the sensitive medical information contained in the February 14 Notice, the Government respectfully requests that the February 14 Notice be filed under seal. *See United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

February 19,